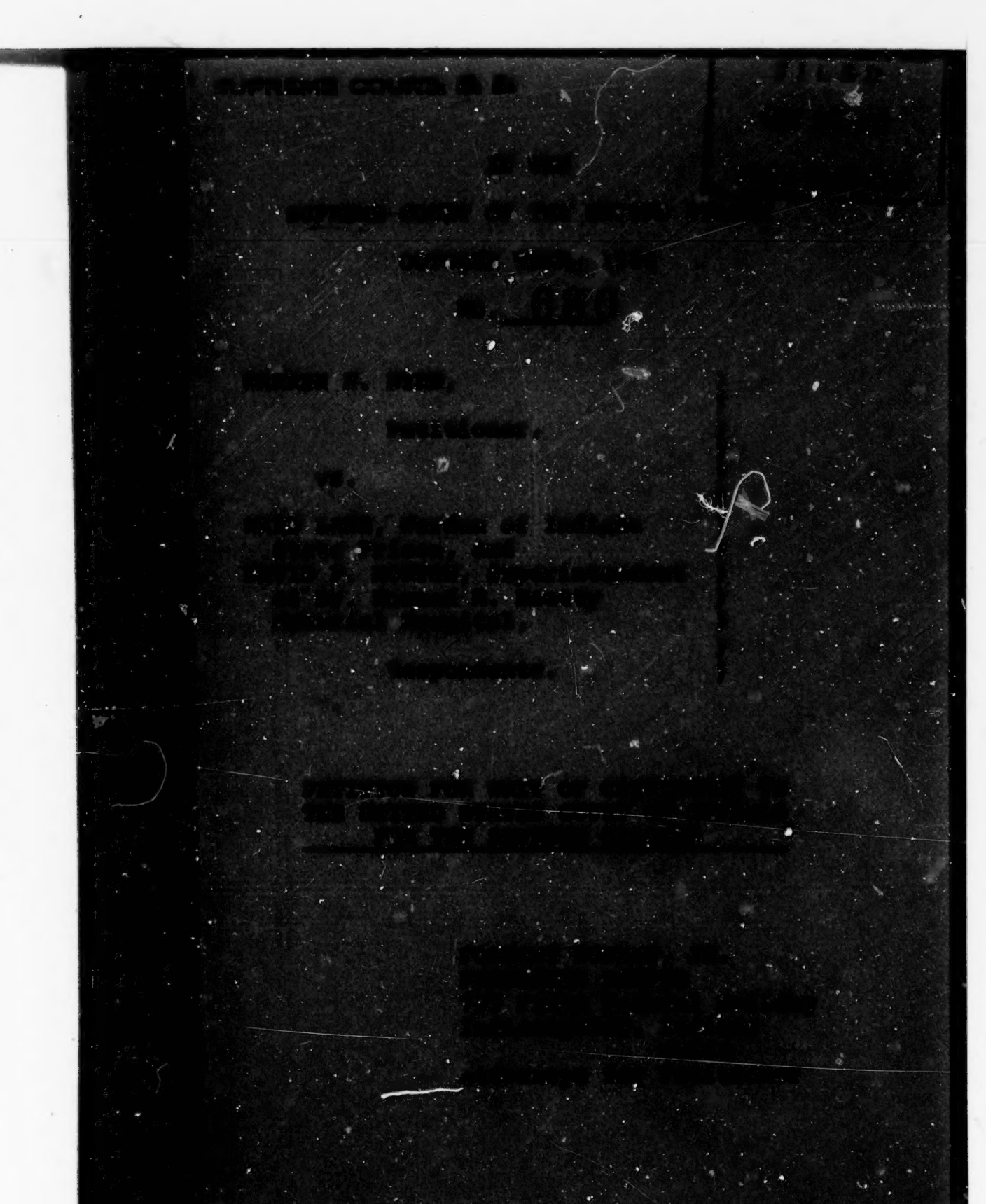

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO._____

| | |
|---|---|
| WARREN H. BYRD, | ) |
| | ) |
| Petitioner, | ) |
| | ) |
| vs. | ) |
| | ) |
| WARD LANE, Warden of Indiana State Prison, and DAVID P. MORTON, Superintendent of Dr. Norman M. Beatty Memorial Hospital, | ) |
| | ) |
| Respondents. | ) |

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Warren H. Byrd, by counsel, Forrest Bowman, Jr., and Ferdinand Samper, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming the order of the United States

District Court for the Northern District of Indiana, South Bend Division, denying petitioner's verified petition for writ of habeas corpus, by which he sought his release from confinement by the respondents herein, officers of the State of Indiana, on the 25th day of July, 1968.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit has not yet been officially reported. It is reproduced in Appendix "A" of this petition. The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, has not been officially reported. It is reproduced in Appendix "A" of this petition.

## JURISDICTION

1. The judgment of the United States Court of Appeals for the Seventh Circuit was entered on July 25, 1968. See Appendix "A."

2. The jurisdiction of this Court is invoked under the provisions of 28 United States Code, Sec. 1254(1).

## QUESTIONS PRESENTED

1. Whether the act of a person under arrest by state officers in signing a written consent for the search of his home is an intelligent and knowing waiver of his Fourth Amendment rights when it is done under impliedly coercive circumstances in response to statements by the officers that a warrant will be obtained and a search made thereunder if a consent is not signed and when the

request for the execution of said consent is made by such officers in the absence of counsel and without the defendant being informed of his right to counsel or of the nature and extent of the Fourth Amendment rights he is being requested to waive.

2. Whether or not a search of the home is incident to a lawful arrest when the person arrested is outside of the home at the time he is approached by the officers armed with a warrant for his arrest and enters the home only at the request of such officers who did not read such warrant of arrest to him until he is within the residence.

3. Whether or not a court of appeals should remand to a district court for further evidence a habeas corpus petition, the decision of which is dependent upon the legality or illegality of a search

and seizure when the evidence does not clearly disclose whether or not the search was made as an incident to a lawful arrest and the resolution of such question is essential to a proper disposition of the habeas corpus petition on its merits.

## CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT 4

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

UNITED STATES CONSTITUTION, AMENDMENT 14, §1

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and

> of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

## STATEMENT OF THE CASE

Petitioner herein filed his verified petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana, South Bend Division, under the provisions of 28 United States Code, Section 2241, et seq., by which petition he complained of his restraint and detention by authorities of the State of Indiana under a judgment convicting him of murder in the first degree, which restraint petitioner alleged was in violation of his constitutional

rights as guaranteed by the Constitution of the United States of America.

Petitioner herein was indicted, tried and convicted of murdering his wife,by the administration of arsenic poisoning, in the Henry Circuit Court of Indiana, and is presently incarcerated in the Northern District of Indiana pursuant to a commitment of that court commiting him for life. The trial commenced June 15, 1961, resulting in a verdict on June 19, 1961, the same date of the rendition of the decision in Mapp v. Ohio, 367 U.S. 643. During petitioner's trial in the Henry Circuit Court, the State of Indiana introduced in evidence State's Exhibit 1, which was a bottle labelled "poison." State's witness, Eugene Short testified that he found said bottle behind the furnace of the defendant's home during a

search he made on March 16, 1961. He further testified that at the same time and place he found ten or twelve similar bottles that were dirty. He also testified that State's Exhibit 1 was not covered with dust or soot.

Petitioner alleged in his petition for writ of habeas corpus that this evidence was obtained as a result of an illegal search of his home, admitted without objection on the part of his trial counsel, and was in violation of his constitutional rights under the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States.

On August 10, 1967, the District Court denied the petition for writ of habeas corpus and in a memorandum opinion stated that the search complained of was made as a result of a valid consent given

by the petitioner herein to the officers who made the search.

The uncontradicted evidence in the habeas corpus hearing in the district court showed that on March 15, 1961, several police officers went to the home of petitioner with a warrant for his arrest for the crime of first degree murder. He was first observed by said officers sitting in his automobile in front of his home talking to a friend. The Sheriff got out of his car and approached Byrd's car and asked him to get out. He then asked him to step into the house. When they arrived in what he assumed to be the front room, he suggested that they step into petitioner's barber shop which was in a room of the house, and they then went in there. At that time, the Sheriff

advised the petitioner that he had a warrant for his arrest. He read the warrant to him and put him under arrest. The warrant was from the City Court in New Castle, Henry County, Indiana, and was for the crime of murder. The witness Davis recalled that he was accompanied by Sgt. John Maston of the New Castle City Police Department, Detective Sgt. Eugene Short of the Indiana State Police, and Sgt. Hosey of the New Castle Police Department.

Prior to going to petitioner's residence, they had prepared a written permission to search his residence, which they took with them. After having read the warrant and placing him under arrest, Sheriff Davis made a request of petitioner for permission to search his house. He testified that he had a waiver

for him and a paper that he would like for him to sign, and Warren Byrd indicated his willingness that they could search. Warren Davis told him that if he did refuse to sign, he would have to proceed with the obtaining of a search warrant. The witness testified that his recollection of the contents of the paper was:

> "I, Warren H. Byrd, hereby give my written permission to the New Castle City Police Department, the Indiana State Police, and the Henry County Sheriff's Office, or any officer of their department, permission to search my house, located at 214 North 20th Street, New Castle, Henry County, Indiana."

He said it went on to give the legal description of the house and the last paragraph stated that any evidence found there could be used in a criminal charge against him. Davis testified that they did conduct a search after the arrest.

The witness, Eugene Short, testified that a search was made on March 16, 1961, during which he discovered the bottle of poison, being State's Exhibit 1.

The District Court denied petitioner's petition for writ of habeas corpus and petitioner appealed that order to the United States Court of Appeals for the Seventh Circuit. The United States Court of Appeals for the Seventh Circuit affirmed the District Court in a two to one decision. The opinion of Judge Major was that the search was made incident to a lawful arrest and that in any event, the consent given was voluntary. Judge Fairchild concurred on the ground that the petitioner voluntarily consented to the search. Judge Kiley dissented on the grounds that the case should be remanded to the District Court for

further evidence for the reason that important questions of fact were left unresolved.

## REASONS FOR GRANTING WRIT

The affirmance of the District Court judgment by the Court of Appeals rests upon several legal postulates, necessarily interwoven to reach the result, all of which are not, or should not be, the law of the land.

One Judge who voted for affirmance placed his decision on the conclusion that the consent was voluntary and that the search was incident to a lawful arrest. The other Judge who concurred in affirmance apparently did not share the view that the search was an incident to a lawful arrest, but did believe that the petitioner voluntarily consented to

the search. The judgment should not be affirmed on the grounds of the voluntariness of the consent for two reasons. Firstly, to hold, as the Circuit Court apparently has, that the consent given was voluntary, amounts to the decision of an important question of Federal law which has not been squarely settled by the United States Supreme Court, but which should be so resolved. Furthermore, the decision is in conflict with principles of law previously decided by the United States Supreme Court. Secondly, the record is not adequate to support the premise that the search was made pursuant to a voluntary consent because of the confusion in the evidence over the time of the search. In this regard, it should be noted that the arrest and execution of the consent occurred on the 15th and

the search occurred on the 16th, and about this there is no dispute. To decide this substantial question as the Circuit Court has done, on the record in this case, amounts to a decision in conflict with applicable decisions of the Supreme Court of the United States and in conflict with another Court of Appeals on the same matter. This Court has held that when the record in habeas corpus is not sufficient to answer the legal issues raised by the petition on appeal, the matter should be remanded for an amplification of the record. Von Moltke v. Gillier (1947), 68 S.Ct. 316, 332 U.S. 708, 92 L.Ed. 309. This proposition has been applied in a habeas corpus case when a conflict of the evidence rendered the record unclear. See Molignaro v. Dutton, (1967), 373 F.2d 729 (5th Cir.).

Certainly the situation in the instant case demands the application of the principle requiring a remand for clarification of the record as suggested in the dissenting opinion in the instant case. To the extent that the affirmance rests upon the proposition that the search was made contemporaneous in time and place with the arrest and as a legal incident to the arrest, the opinion is contrary to the undisputed evidence in the record and amounts to a conflict with the decision of another Court of Appeals on the same matter. The undisputed evidence shows that petitioner was approached by police officers when he was seated in his car outside of his home. Police officers had a warrant of arrest in their possession, but did not serve it on petitioner until they had

pursuaded him to enter his home in their company. These facts are even more aggravated than the facts in the case from the District of Columbia Circuit which is in conflict with the instant case. See McKnight v. U. S. (1950), 183 F2d 977 (D.C. Cir.). See also Taglavore v. U. S. (1961), 291 F.2d 262, 265, (9th Cir.).

All of the reasons advanced by petitioner for granting certiorari in this case are important and substantial questions of Federal law. However, the most substantial and probably the most essential, from the standpoint of petitioner's petition, is the question of the voluntariness of the consent signed by petitioner. If that consent was not voluntary, it is only necessary to apply the McKnight case to the

undisputed evidence in this record and reverse the judgment.

This Court should decide the issue of the voluntariness of that consent on the undisputed evidence in the record on that point. The Court of Appeals for the Seventh Circuit has already decided that a purported waiver of Fourth Amendment rights is not a valid waiver unless there has been an explanation of those rights. See United States v. Nikrasch, 367 F2d 740. This case is in conflict with the case of Gorman v. United States, 380 F.2d 158, (1st Cir.). However, the Court of Appeals for the Seventh Circuit declined to follow their Nikrasch decision in the instant case. Petitioner submits that Nikrasch is good law and should be applied in this case and this

Court should grant certiorari if for no other reason than to resolve the conflict between the Nikrasch and the Gorman decisions. The Nikrasch decision is consistent with the definition of waiver established by the case of Johnson v. Zerbst, 304 U.S. 458, 464, 82 L.Ed. 1461, 1466, 58 S.Ct. 1019, 146 A.L.R. 357. The Gorman opinion is contrary to that doctrine and the failure of the Court in this case to apply the Nikrasch authority is in conflict with Johnson v. Zerbst. Waiver is an intentional relinquishment or abandonment of a known right or privilege. Without an explanation of the nature of the Fourth Amendment rights being waived, the signing of the consent cannot be characterized as a waiver. Certainly, if the Fifth Amendment privilege against self-incrimination cannot

be voluntarily waived without an explanation of the nature of those rights, then the Fourth Amendment privileges against search and seizure cannot be waived without explanation. Furthermore, the clear implication of the evidence is that the petitioner undoubtedly felt that his refusal to sign the waiver would not only be futile, in view of the threat to obtain a search warrant if the consent were not signed, but also would appear to be an incriminating act to the petitioner as it would to any uninformed layman. In order to obtain a valid consent to search, petitioner submits that the police officers seeking such consent should be required to inform the defendant of his right to counsel and his right to refuse. He should also be informed

that if he decides to refuse that his refusal cannot be used as incriminating evidence against him. If the threat to obtain a search warrant is made in order to pursuade the defendant to sign the consent, the officers should be required to explain honestly and accurately the requirements for obtaining a search warrant so that a petitioner may evaluate that threat in determining whether or not to sign the consent.

The least petitioner is entitled to in this case is a remand to the District Court for additional evidence to amplify the record on the issue of when the search was made, all as set out in the dissenting opinion. The most he is entitled to is reversal because of the coercive nature of the consent obtained.

## CONCLUSION

For all the reasons stated hereinabove, this petition for writ of certiorari should be granted.

Respectfully submitted,

Forrest Bowman, Jr.
Ferdinand Samper
Attorneys for Petitioner

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

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SEPTEMBER TERM, 1967, APRIL SESSION, 1968

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| | |
|---|---|
| No. 16535 | )Appeal |
| WARREN H. BYRD, | )from the |
| Petitioner-Appellant, | )United |
| | )States |
| v. | )District |
| | )Court for |
| WARD LANE, Warden of Indiana State Prison and DAVID P. MORTON, Superintendent of Dr. Norman B. Beatty Memorial Hospital, | )the Nor- |
| | )thern Dis- |
| | )trict of |
| | )Indiana, |
| | )South Bend |
| Respondents-Appellees. | )Division. |

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July 25, 1968

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Before MAJOR, Senior Circuit Judge, KILEY and FAIRCHILD, Circuit Judges.

MAJOR, Senior Circuit Judge. Petitioner is incarcerated in a State prison located in the Northern District of Indiana, pursuant to a commitment of the Henry Circuit Court of that State. He was charged with and found guilty of murdering his wife by the administration of arsenic poison. He was arrested March 15,

1961, and the trial in the State court commenced June 15, 1961, resulting in a verdict on June 19, 1961, the same date that the Supreme Court of the United States announced its decision in Mapp v. Ohio, 367 U.S. 643. The judgment of conviction was affirmed by the Indiana Supreme Court, Byrd v. State, 185 N.E. 2d 422 (1962).

The case before us was initiated by a twenty-page petition for a writ of habeas corpus, complaining that he was detained by the State of Indiana in violation of his rights under the Constitution of the United States. A supplemental petition was filed alleging the exhaustion of all State court remedies. We see no point in relating or discussing the proceedings in the State court by which such remedies were alleged to have been exhausted for the reason that respondents take no issue in this respect; in fact, they tacitly concede that such remedies were exhausted. Neither do we need to discuss Mapp v. Ohio because concededly it is applicable insofar as pertinent to the instant situation.

The petition is unique in that it was predicated solely upon the premise that the two attorneys who represented petitioner in his State court trial were incompetent and that the "restraint and detention of petitioner is in violation of his constitutional rights as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and specifically his constitutional rights to counsel, due process of law

and equal protection of the laws, all by reason of the following facts: * *" Then follow some fifteen pages of allegations, all directed to such premise.

Following a lengthy hearing devoted in the main to petitioner's contention that his Sixth Amendment rights had been violated, Judge Robert Grant rendered a memorandum opinion in which he noted that the competency of one of the attorneys was conceded by petitioner and found on the proof that the other attorney was also competent.

Among numerous allegations contained in the petition was that in paragraph (j):

> "That at the trial of the cause herein the State of Indiana introduced in evidence without objection State's Exhibit #1 which was a bottle labeled poison. That State's witness Eugene Short testified that he found said bottle behind the furnace of the Byrd home during a search he made of the Byrd home on March 16, 1961. That at the same time and place he found ten or twelve similar bottles that were dirty; that Exhibit #1 was not covered with dust or soot."

The petition alleged that this evidence was obtained as a result of an illegal search of petitioner's home, admitted without objection on the part of petitioner's counsel, and was in violation of his constitutional rights under the Fourth, Fifth and Fourteenth Amendments to the

Constitution of the United States. In response to this allegation, the court in its memorandum opinion stated:

> "Finally, petitioner argues that evidence discovered upon the search of his home by police and admitted or referred to during the trial was not admissible because obtained as a result of an illegal search. (Petition at 8) At the hearing held in this Court May 12, 1967, Respondent's Exhibit A was admitted, being petitioner's consent to have his house and residence searched by Warren Davis, Henry County Sheriff, and other officers."

It further found:

> "All testified that Byrd signed it in their presence and that it was done voluntarily. All that Byrd could testify to was that he did not remember signing such a form. In light of all the testimony given at that hearing, the Court can only conclude that the evidence obtained as a result of the search was properly admissible."

By its order entered August 10, 1967, the court denied the petition for writ of habeas corpus, from which order petitioner appeals.

The sole issue before this court is whether the search of petitioner's home, resulting in the seizure of a bottle of

poison, violated his constitutional rights. The resolution of this issue is dependent upon whether petitioner voluntarily consented to such search or whether it was made pursuant to a lawful arrest.

It has been often held that whether a consent to search is voluntary is a question for the trier of facts and its finding, if substantially supported, will not be disturbed on review. Drummond v. United States, 350 F.2d 983, 988; United States v. Thompson, 356 F.2d 216, 220, cert. den. 384 U.S. 964, and Ruud v. United States, 347 F.2d 321, 322.

We deem it unnecessary to recite in detail the testimony of Sheriff Davis and the three other officers (not five or six, as suggested by petitioner) as to the circumstances concerning petitioner's arrest and his consent to the search of his home. Davis testified that he and the other officers went to petitioner's home at about 4:30 p.m. March 15, 1961, and found him sitting in a car with another man. Petitioner and Davis went into petitioner's house where his son, daughter, brother and sister-in-law were present. Either petitioner or Davis suggested that they step into the barber shop which was in the front room of the house. When there, Davis advised petitioner that he had a warrant charging him with the murder of his wife, which he gave to petitioner. Davis asked petitioner if they could have permission to search his house, which petitioner freely gave, stating, "I have nothing to hide. Sure you can search. I have nothing to hide."

At the same time, Davis informed petitioner that if he did not sign the written consent which Davis produced authorizing such search, he would be forced to obtain a search warrant, and petitioner signed it. Davis testified, corroborated by the testimony of the other officers, that no promise or threat was made and no form of coercion or intimidation was employed to obtain such consent. Petitioner testifying on his own behalf stated that no one asked his permission to search his premises, that they (referring to the officers) "just charged on in the house," and that nothing was presented to him for his signature. After being shown the written consent, he testified that he did not remember being presented with the paper at that time, although he admitted the signature appeared to be his.

We agree with the District Court that petitioner's consent to search his home was given freely and voluntarily, without duress, promise or coercion; in fact, we think the testimony unmistakably discloses that such consent was given both orally and in writing.

Petitioner cites a number of cases in support of his contention that under the circumstances any consent obtained to search was as a matter of law involuntary. We defer a discussion of these cases for the reason that many of them consider the legality of a search made either by voluntary consent or incident to a lawful arrest.

This brings us to the contention relied upon by respondents that the search in

question was proper because made incident to a lawful arrest. Unfortunately this issue was not developed in the trial court as it might have been. Neither petitioner on brief here nor the court in its memorandum opinion makes any mention of it. We suspect that this situation is due to the fact, already noted, that petitioner's able counsel in the instant matter devoted their main effort in an attempt to prove incompetency of petitioner's trial counsel, and that the issue regarding the search was merely incidental.

Petitioner was arrested in his own home, in the execution of a lawful warrant, at about 4:30 p.m. March 15, 1961. Petitioner has engendered some confusion as to whether the search was made following the arrest or the next day by alleging in his petition and repeating in his statement of facts, "That State's witness Eugene Short testified that he found said bottle behind the furnace of the Byrd home during a search he made of the Byrd home on March 16, 1961." This allegation was denied in respondents' response to the petition. Respondents on brief state, "In the case at bar the Appellant was arrested with a lawful warrant and the search was contemporaneous in time and space with the arrest." Petitioner does not challenge this statement either directly or indirectly.

It appears to us that petitioner on brief abandons any contention that the search was not made immediately following his arrest. In his argument he states, "The evidence shows that at the time of

the search four, five or six police officers went into the home of the petitioner in the company of the Sheriff, who had with him a warrant for the arrest of the petitioner on a charge of first degree murder." Referring to the written consent which was signed by petitioner at the time of his arrest, the brief states, "The petitioner agreed to sign the document and stated that he had nothing to hide. The document was signed by the petitioner, and the search was made." It is not reasonable to think that if there was any question as to when the search was made with reference to the time of arrest, petitioner would have made inquiry of the officers who made the arrest, conducted the search and testified in the instant matter. The only testimony on this point was elicited by the court from Davis, as follows:

> "The Court: Then the search that was made was made at that time, after the arrest and after the signing? The search was then conducted; is that what I am to understand?
> "The Witness: We did conduct a search, yes, after the arrest, yes.
> "The Court: Thereafter?
> "The Witness: That's right."

We need not dwell upon cases cited by petitioner which clearly reveal that the rule of Mapp v. Ohio, 367 U.S. 643, is applicable in the instant situation where the judgment of conviction in the State court was entered subsequent to that of the court in Mapp. As was stated

in Ker et ux. v. California, 374 U.S. 23, 30:

> "We specifically held in Mapp that this constitutional prohibition is enforceable against the States through the Fourteenth Amendment. This means, as we said in Mapp, that the Fourth Amendment 'is enforceable against them [the states] by the same sanction of exclusion as is used against the Federal Government,' by the application of the same constitutional standard prohibiting 'unreasonable searches and seizures.'"

Ker supports the point that a valid search may be made incident to a lawful arrest. In that case the defendant's room was search without either an arrest or search warrant. The court stated (page 41):

> "Having held the petitioners' arrests lawful, it remains only to consider whether the search which produced the evidence leading to their convictions was lawful as incident to those arrests. The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures." (Citing cases.)

The court affirmed the conviction in that case on the premise that the search and seizure was incident to a lawful arrest.

The rationale of Ker is pertinent to the instant situation where the search and seizure followed petitioner's arrest on an admittedly lawful warrant.

Petitioner contends that the consent to search his home was not voluntary because he was not at the time apprised of his Fourth Amendment rights. Two cases are strongly relied upon in support of this contention. United States v. Nikrasch, 367 F.2d 740, a recent decision of this court, and Judd v. United States, 190 F.2d 649. Both of these cases are distinguishable upon the marked difference in the factual situation. In Judd, for instance, the defendant was arrested without a warrant at 11 p.m., held in jail on an open charge and interrogated for several hours by police officers concerning general criminal activity. At 2 a.m., in the custody of four police officers and while handcuffed, he was taken to his own home, which was searched and incriminating evidence found. Defendant testified that all of this was against his will and without any consent; in fact, one of the police officers testified that the defendant "didn't give us actual consent to search it." Under these circumstances the court held that the consent for the search was not voluntary, and reversed the conviction. Thus, the facts in Judd are a far cry from those here.

In Nikrasch, this court reversed a conviction on the ground that evidence at the trial was obtained by an unreasonable search and seizure. Petitioner relies particularly upon the statement (page 744):

> "On this appeal the Government has not argued that defendant waived the protection accorded by the Fourth Amendment by 'consenting' to the 9:00 A.M. car search at the police station and the subsequent search at the Mancusco Chevrolet agency. Since the arrested defendant was then in custody in the Skokie cell-block and had not been apprised of his Fourth Amendment rights, the trial court correctly observed that no true consent had been given to Detective Reiter."

Respondents urge us to "re-examine and re-evaluate" our holding in Nikrasch on the point that no true consent can be given absent an apprisement of petitioner's Fourth Amendment rights. We note that the First Circuit in Gorman v. United States, 380 F.2d 158, stated:

> "We cannot accept the recently suggested rule that a specific warning of fourth amendment rights is necessary to validate a warrantless search after the suspect has been arrested." (Citing Nikrasch and other cases.)

While we think our statement in Nikrasch of dubious propriety, we are not disposed to reject it because it was given application to a factual situation at great variance with that here. In that case, the defendant and companions were arrested without a warrant at about 1 a.m. on a disorderly conduct charge, and were committed to jail. At the time of the

arrest, a search of defendant's car was made with the consent of one of the parties. Some eight hours after they were lodged in jail, the officers searched the car while it was at the police station and again after it was removed to an automobile agency. As to the first search this court stated (page 742):

> "The District Court found that the 1957 Chevrolet was seized at the filling station pursuant to a lawful arrest of defendant and his companions, that the Village ordinance was constitutional, that the officers had probable cause for making the arrests thereunder, and that the search and seizure were incidental to the arrests."

This court evidently approved of the search made at the time of the arrest. We stated (page 743):

> "Even if the police had the right to search the car at the gas station, this does not decide the question of the reasonableness of the 9:00 A.M. search at the police station and subsequently at Mancusco's Chevrolet agency."

The subsequent searches, purportedly made with defendant's consent, were held to be in violation of the defendant's constitutional rights.

It is also pertinent to observe that in Nikrasch we relied heavily upon Preston v. United States, 376 U.S. 364, which

reversed a judgment of conviction upon the ground that the search was not made incident to a lawful arrest. In Preston, the search of defendant's car was made by the police department some eight hours after defendant was committed to jail. The court recognized the propriety of a search made incident to a valid arrest but held (page 367):

> "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."

In the instant case petitioner was arrested in his own home on a legal arrest warrant which he was permitted to read, charging him with the crime of murdering his wife with poison. There is substantial evidence in support of the finding that this consent to search was voluntarily given. In any event, the search was made as an incident to a lawful arrest, and the bottle of poison seized was relevant to the crime with which petitioner was charged.

The order appealed from is
AFFIRMED.

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FAIRCHILD, Circuit Judge (concurring). I concur on the ground that the petitioner voluntarily consented to the search.

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KILEY, Circuit Judge, dissenting.

I dissent. The issues which this court must resolve in deciding this case are whether petitioner voluntarily consented to the search of his home which produced a bottle of poison introduced as evidence against him, or whether the search, if not consented to, was nevertheless justifiable as incidental to petitioner's arrest. In my view the record now before us does not contain sufficient information to enable us to make an intelligent determination of these issues.

The theory on which petitioner relied in his brief in this court is that the consent to search his house, which he signed on March 15, was invalid because it was signed, without proper warning, while petitioner was under arrest. During the oral argument the prosecuting attorney stated that the record of petitioner's state trial showed that the search of petitioner's home which yielded the bottle of poison was made on March 16, and not on March 15 when the consent had been signed.

A review of the trial court record shows that the police officer who found the bottle of poison testified unequivocally that the bottle was found on March 16 and the bottle itself was labeled with the policeman's initials and the date "3-16-61."

In the light of the strong indication in the record that the search was made on

March 16, we should not ignore the significance of this pertinent information for the determination of the questions before us.

The questions of law that must be considered by us are: was the consent to a search of petitioner's home signed on March 15 an effective waiver of petitioner's Fourth Amendment rights with regard to the March 16 search; and was the search made on March 16 incidental to the arrest on March 15.

In order for a search to be justifiable as incident to an arrest it must be contemporaneous in time and place with the arrest. If the search in this case was made one day after the arrest, it was not made contemporaneously with the arrest and was therefore not incidental to the arrest. Preston v. United States, 376 U.S. 364; United States v. Harvey, #15863, 7th Cir. July 5, 1968.

The district court must decide in the first instance the factual question whether there was a valid consent to the March 16 search. The government has the burden of proving by clear and positive evidence that an unequivocal, specific, intelligent consent for the search has been given. United States v. Smith, 308 F.2d 657; Channel v. United States, 285 F.2d 217; Judd v. United States, 190 F.2d 649.

The most that can be gleaned from the record before us is that petitioner met the police outside his home on

March 15, 1961. He was escorted inside where police told him he was under arrest and asked him to sign a consent to search his home. He signed the consent. A bottle of poison was found twenty-four hours later during a search of his home. Important questions of fact left unresolved include: what did the consent signed by petitioner say; was there an initial search made on March 15 when the consent was signed, or was the search on the 16th the first to be made; was petitioner aware, at the time of signing the consent, that the search would be delayed or that more than one search would be made, or was he under the impression that he was agreeing to a single immediate search; was petitioner aware that the March 16 search was being made; was he in custody when it was made; was he represented by counsel at the time the March 16 search was made, and if so was his lawyer aware of the consent and of the March 16 search.

It is my opinion that this court cannot, without the answers to at least some of these questions, determine that the state has met its burden of proving that there was an unequivocal and specific consent to the March 16 se rch. We cannot speculate or presume in favor of the waiver of a vital constitutional right.

I would retain jurisdiction and remand with directions to the trial court to conduct further hearings and to make additional findings of fact, to be certified to us, in order that we may make a sound determination of the issues before us. See Willing v. Binenstock, 302 U.S.

272, 277.

A true Copy:
Teste:

_____
Clerk of the United States
Court of Appeals for the
Seventh Circuit.

IN THE UNITED STATES DISTRICT COURT FOR

NORTHERN DISTRICT OF INDIANA

SOUTH BEND DIVISION

| | | |
|---|---|---|
| WARREN H. BYRD, Petitioner, | ) | |
| vs. | ) | CIVIL NO. 3919 |
| WARD LANE, Warden of Indiana State Prison and DAVID P. MORTON, Superintendent of Doctor Norman M. Beatty Memorial Hospital, Respondents. | ) | |

O R D E R

This cause comes on before the Court on petitioner's Verified Petition for Writ of Habeas Corpus, respondents' return to the Court's show cause Order, and the parties' post-hearing briefs in support of their respective positions.

After careful consideration of the issue here involved, the Court does now find that the allegations of the Petition are not supported by the evidence and that petitioner's constitutional rights were in no way infringed, as alleged in the Petition. Therefore,

IT IS THE ORDER OF THIS COURT that the Verified Petition for Writ of Habeas Corpus, filed by petitioner on November 18,

1966, be, and the same hereby is DENIED.

/s/ Robert A. Grant
DISTRICT JUDGE

ENTER: Aug. 10, 1967

M E M O R A N D U M

Petitioner was convicted on June 19, 1961, of first degree murder in the Circuit Court, Henry County, Indiana. His claim here is that he was denied the competent and effective assistance of counsel at that trial, and in support thereof alleges ten specific grounds constituting what, if proved, petitioner concludes would amount to a constitutional lack of representation.

Before proceeding to examine those grounds seriatim, we would note also the contention that the evidence adduced so failed to support the verdict as to amount to a denial of due process. The first and last time this contention was made was in the petition, unsupported by any such specific grounds as appear in connection with the primary issue. No mention of this contention was made either at the time of the hearing or in petitioner's post-hearing brief. Nevertheless, because the Indiana Supreme Court split 3-2 on this question, Byrd v. State, 185 N.E.2d 422 (1962), the Court has examined

the transcript and finds that the evidence is not so lacking as to subject petitioner's conviction to due process attack on this ground.

At his state court trial, petitioner was represented by two members of the Indiana Bar, Loys Green and Clarence Benadum. Benadum, who appeared with Green at every stage of the proceedings and through the filing of, and hearing on, the motion for new trial (dep. of Benadum, Exhibit 1, aff. of Benadum at 1), is stipulated in the Petition to be ". . . at all times material herein . . . experienced and successful in the defense of criminal actions." (at 2). Green, whose practice has included criminal matters (Green, dep. at 2), has been a practicing attorney for thirty-eight years (Id. at 1). For the following reasons, it is claimed that petitioner was denied the right to competent counsel at his trial.

First, it is claimed that Green contacted petitioner while the latter was under arrest and in custody, for the purpose of soliciting Byrd to employ him (Green) in regard to the offense with which Byrd was charged. It is also claimed that Green represented that he was experienced in the defense of criminal actions, when in truth he was not. Green states that his first contact with Byrd in connection with the murder charge pending against Byrd came when a Mrs. Bergin, the cook at the jail in which Byrd was incarcerated, called him to say that Byrd wanted to see him. (Green, dep. at 3). This is verified by Mrs. Bergin,

who states that she called Green at the behest of Byrd, who said that he needed a lawyer and wanted to speak with Loys Green. (Bergin, dep. at 2-3). Green had previously done work for Byrd. (Green,dep. at 3).

Green denies volunteering any statements to Byrd concerning an 'extensive criminal practice," (Id. at 5), although there was some discussion which apparently related to Green's representation of a client in a murder or manslaughter case at Greenfield. (Id. at 5). Green did have experience defending rape and robbery cases, (Id. at 7), and in prosecuting robbery cases (Id.), and had successfully defended at least one manslaughter case. (Id. at 8 and 27). He had previously worked together with Clarence Benadum. (Id. at 11-12). Benadum corroborates Green in this, adding that the trials in which they had been associated involved criminal matters. (Benadum, dep. at 2).

Petitioner further charges that Green "failed and refused to heed and act upon the advice and counsel of the said Clarence Benadum during the trial of the petitioner herein." (Petition at 2-3). In answer to this charge, Green states:

> Q. "Did you ever fail or do something or follow some particular strategy that Mr. Benadum strongly urged?"
>
> A. "Not to my knowledge. I think as a matter of fact, I would listen to what Mr. Benadum

> - or do what Mr. Benadum suggested. Although we conferred, maybe we had, say, some disagreements about certain matters, but I would say this case was handled -- well, I don't hardly know how to say it except for the fact that Mr. Benadum had a lot of experience and I listed to him. Let me put it that way." (Green, dep. at 11).

Green also explained in answer to a question inquiring into whether or not Green had conferred with Benadum as to the advisability of getting a continuance:

> A. "Again reiterating what I have said before, everything that was done about this case, after Mr. Benadum was employed, was done with Mr. Benadum's knowledge, his prescence, on every occasion." (Id. at 15).

Benadum corroborates Green again.

> "Each and every decision made regarding the trial of this above captioned cause was made jointly between this affiant and the said Loys W. Green, Attorney. The only disagreement between the said Loys W. Green, and this affiant regarding any question of evidence or of method was that I suggested to Mr. Green that he not be quite so tedious with the Jury on his voir dire examination of said Jurors. Except for the depth of the

> voir dire examination, this affiant and Attorney Loys W. Green were in complete accord in the strategy of the defense of this cause left with us by our client, Warren H. Byrd, and we were in accord in all evidentiary matters in the trial of this cause." (dep. of Benadum, Exhibit 1, aff. of Benadum at 2). See also Benadum, dep. at 6.

Petitioner also charges that great prejudice had attached to him prior to the trial of the case, but that counsel failed and refused to obtain or attempt to obtain a change of venue, and failed to request a continuance of the cause. In answer to this, Green categorically states that it was upon Byrd's insistence that the trial go forward as soon as possible in the county in which venue was initially laid, and against the advice of both Green and Benadum, that the trial was proceeded with without a request either for a change of venue or for a continuance. (Green, dep. at 14-16). Benadum states:

> "... defendant herein repeatedly insisted upon being tried in Henry County, Indiana, and indicated a desire to be tried as quickly as was possible." (dep. of Benadum, Exhibit 1, aff. of Benadum at 1). See also Benadum, dep. at 3-5.

Petitioner next argues that two prospective jurors testified that they did not know him although in truth they did. Petitioner claims that counsel were informed of this, but failed to remove said

jurors. In answer to this, Green testifies that he does not remember Byrd voicing any objections to the seating of these jurors. (Green, dep. at 12). He also states unequivocally that the jury was satisfactory not only to himself and to Clarence Benadum, but also to petitioner. (Id. at 12-13). Again, Beandum concurs. (Benadum, dep. at 5-6). Probably the best evidence against petitioner on this point came from his own mouth at the hearing held on the instant Petition on May 12, 1967, in which Byrd testified on direct examination:

Q. "You at no time, do I understand it correctly, stood before the presiding judge there and said 'I accept the jury?'"

A. "Out in the courtroom, yes."

Q. "Yes?"

A. "Yes."

Q. "Did you stand up and say it or did Mr. ____, your attorney, say it?"

A. "Well, the attorneys accepted them."

Q. "I'm asking you whether you did."

A. "Then I was adked, 'Do I accept?' and I said 'Yes.'"

Petitioner's next series of arguments concerns allegedly inadmissable evidence,

the admission of which was not objected to by either attorney. Of the six specific references made in the Petition concerning such instances, we find only two which are well-taken. Trial counsel allowed one Robert Forney, Director of the Indiana Laboratory of Toxicology, to testify, without objection, as follows:

> A. "Arsenic is one of the most common poisons used, particularly in homicides, and it always has been." (Trans. of trial proceedings, hereinafter "Trans.," at 114).

Although Mr. Forney may have qualified as an expert on this subject, the testimony had no bearing on the issues involved in the case.

It is also alleged that it was error to allow the state "to introduce without objection a certain paper cup and straw." (petition at 7). We do not find in the record before us that any such paper cup and straw were introduced. We do note, however, that Mr. Forney was allowed to testify concerning tests which he had run on certain paper cups, one of which allegedly was the one from which decedent had drunk the fluid containing arsenic poisoning. Proof concerning the identity of this cup as the one from which decedent had drunk was lacking, which may account for the State's failing to introduce it as an evidentiary exhibit. On the other hand, there are suggestions in the record indicating that had the State wanted to put in further proof concerning the identity

of the items, it could have. See, for example, the answer of witness Forney (Trans. at 125, lines 26-7) which was ordered stricken.

The remaining four references to allegedly inadmissable evidence are not well-taken. Beginning with the hearsay testimony relating to Donald Duck orange juice, the Court finds that not only did this come out during the course of cross-examination by petitioner's counsel (Trans. at 69), but the Court fails to see how such a statement could have been prejudicial. Petitioner has failed to enlighten us on this.

Next, petitioner argues that State's exhibits 2, 3, 4, and 5, as well as testimony concerning a specimen of human hair, should not have been admitted, and would not have been so had proper objection been made, for the reason that the necessary chain of custody had not been established. Suffice it to say that we have read thoroughly all the relevant testimony contained in the Transcript relating to this question and cannot find that "a necessary link in the chain of identification" is missing. Novak v. Districtof Columbia, 160 F.2d 588 (D.C. Cir. 1947). See also Annot. 21 A.L.R.2d 1206 (1952).

Finally, petitioner argues that evidence discovered upon the search of his home by police and admitted or referred to during the trial was not admissable because obtained as a result of an illegal search. (Petition at 8). At the hearing held in this Court May 12, 1967,

Respondent's Exhibit A was admitted, being petitioner's consent to have his house and residence searched by the New Castle Police, the Henry County Sheriff's Department, and/or the Indiana State Police. Warren Davis, who, in 1961, was the Henry County Sheriff, John Masten who, in 1961, was the Juvenile Captain in the New Castle City Police Department, and Eugene Short who, in 1961, was with the Indiana State Police, all testified that they were present when Byrd signed the form giving consent to search. All testified that Byrd signed it in their prescence and that it was done voluntarily. All that Byrd could testify to was that he did not remember signing such a form. In light of all the testimony given at that hearing, the Court can only conclude that the evidence obtained as a result of the search was properly admissable.

To conclude, the Court believes that the facts outlined above speak for themselves. Petitioner was at all times during the trial of the cause represented not only by one attorney who is admittedly competent but also by a second one whom the Court now finds to have been competent. Petitioner clearly was adequately represented throughout all of the proceedings, and there is nothing to indicate that any of the actions taken from beginning to end were such as to constitute these proceedings "a farce or a sham." United States ex.rel.Feeley v. Ragen, 166 F.2d 976 (7th Cir. 1948). Forty-nine objections by defense counsel were made at the trial, of which thirty-nine were sustained. During Mr. Forney's testimony

alone, aleven objections were made, of which eight were sustained. The record shows that at least three of these objections were made by Clarence Benadum who is thus shown by the record to have been taking an active part during the trial. Not only has petitioner failed to prove his case, but the positive evidence shows that Loys Green, chief counsel, and Clarence Benadum, associate counsel, ably fulfilled their duty in the presentation of this petitioner's case.